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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
Petition For Rulemaking To Determine The Terms and Conditions Under Which Tier 1 LECs Should Be Permitted To Provide InterLATA Telecommunications Services	) RM-8303

COMMENTS OF
THE INFORMATION TECHNOLOGY
ASSOCIATION OF AMERICA

The Information Technology Association of America ("ITAA"), by its attorneys, hereby submits the following comments in response to the "Petition For Rulemaking To Determine The Terms And Conditions Under Which Tier 1 LECs Should Be Permitted To Provide InterLATA Telecommunications Services" ("Petition"), which was filed by Bell Atlantic, BellSouth Corporation, NYNEX Corporation, Pacific Telesis Group, and Southwestern Bell Corporation ("Bell Companies" or "BOCs") on July 15, 1993. As set forth below, if the Commission decides to initiate the requested rulemaking, it should propose -- and solicit comment on -- the requirement that the BOCs provide interLATA enhanced services only through fully separate subsidiaries of the kind prescribed by the Commission in the Second Computer Inquiry and subject to such other structural and nonstructural safeguards as the public interest may require.

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I. INTRODUCTION

ITAA is the principal trade association of the computer and software services industry. Its member companies provide the public with a wide variety of computer services, including local batch processing, software design and support, systems integration, facilities management and network-based information services. The enhanced services provided by ITAA's member companies are used by business, government and residential customers, and include such diverse offerings as credit card authorization, computer-aided design and manufacturing, database retrieval, data distribution, electronic mail, electronic data interchange, gateways, information management, transaction processing, value-added network services, and other remote access data processing services. In delivering these enhanced services to their customers, ITAA's members rely on the communications services provided by local telephone companies and interexchange carriers.

In their Petition, the Bell Companies have asked the Commission to determine the appropriate terms and conditions pursuant to which they should be permitted to provide interLATA communications services.[1] Their Petition, however, has consequences that extend far beyond interLATA communications. As a result of a recent decision of the U.S. Court of Appeals for the D.C. Circuit,[2] the BOCs are now free to provide information services, albeit only on an intraLATA basis. The court's decision, together with the interLATA relief now being sought by the BOCs, would open the door to BOC entry into the enhanced services marketplace on an interLATA basis.

1/ See Petition For Rulemaking To Determine The Terms And Conditions Under Which Tier 1 LECs Should Be Permitted To Provide InterLATA Telecommunications Services at 1 (filed July 15, 1993).

2/ United States v. Western Electric Co., 993 F.2d 1572 (D.C. Cir. 1993).

Given the prospect of expanded BOC entry into the enhanced services marketplace, the Bell Companies' Petition necessarily calls into question the efficacy of the nonstructural safeguards adopted by the Commission in the Third Computer Inquiry. These safeguards, which are now being challenged in the courts[3] and which have been widely dismissed as inadequate in the context of intraLATA enhanced services, would be even less effective in guarding against anticompetitive abuse in the interexchange market for these services. The inadequacy of these safeguards is of concern to ITAA because, as the Commission has often recognized, most enhanced services are provided on a national, rather than intraLATA, basis.[4] Thus, if the Commission decides to initiate the rulemaking requested by the Petition, the Commission should consider alternatives to the nonstructural safeguards adopted in the Third Computer Inquiry.[5]

With the arrival of a new Administration, the rulemaking proceeding requested by the BOCs would provide the Commission with a timely and appropriate opportunity to revisit -- and reverse -- a failed policy of the 1980s. In the deregulatory frenzy surrounding Computer III, the Commission abandoned the requirement that the BOCs provide enhanced services through fully separate subsidiaries and replaced it with untested and facially inadequate nonstructural safeguards. The Commission took this step, notwithstanding the fact that only fourteen months earlier it had specifically rejected reliance on nonstructural safeguards as totally inadequate to prevent

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3/ See infra note 9.

4/ See Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 2 FCC Rcd 3035, 3061 n.374 (1987).

5/ ITAA, however, questions whether it would be a productive use of the Commission's limited resources to undertake this rulemaking, given the fact that the restriction on the BOCs' provision of interexchange services has not yet been lifted, and such action does not appear to be imminent.

discrimination and improper cost-shifting.[6] In the discussion which follows, ITAA will explain why, with the entry of the BOCs into the interLATA enhanced services marketplace, the shortcomings of Computer III's nonstructural safeguards can no longer be ignored, and why the Commission, if it initiates the requested rulemaking, should solicit comment on the requirement that the BOCs provide enhanced services only through separate subsidiaries and other complementary safeguards.

II. ANY RULEMAKING THAT ADDRESSES THE BELL COMPANIES' ENTRY INTO THE INTERLATA MARKETPLACE SHOULD ALSO ADDRESS THE REQUIREMENT THAT THE BOCS PROVIDE INTERLATA ENHANCED SERVICES THROUGH FULLY SEPARATE SUBSIDIARIES OF THE KIND PRESCRIBED IN COMPUTER II.

In their Petition, the Bell Companies have asked the Commission to institute a rulemaking proceeding to "specify the safeguards that would govern BOC participation in long-distance markets."[7] Although the BOCs' Petition focuses exclusively on communications services, the relief the carriers seek -- entry into the interLATA marketplace -- would have equally important consequences for enhanced services. This should not be surprising. At the present time, the BOCs stand on the same footing in both the communications and enhanced services markets, i.e., they can only provide service on an intraLATA basis. If the Commission -- and ultimately the courts -- were to grant the relief which the BOCs now request, the Bell Companies would be in a position to become major players in the interLATA markets for both basic and enhanced services. Thus, notwithstanding its focus on communications services, the carriers' Petition necessarily requires the Commission to consider the

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6/ See Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, 95 F.C.C.2d 1117, 1137 (1983) [hereinafter "BOC Separation Order"].

7/ Petition at 9.

safeguards needed to prevent the BOCs from using their local exchange bottleneck to engage in anticompetitive conduct in both the basic and enhanced interLATA service markets.

ITAA therefore calls upon the Commission, if it decides to initiate the rulemaking requested by the BOCs, to take a comprehensive look at the question of safeguards. In particular, ITAA urges the Commission to propose -- and to invite interested parties to comment on -- the use of structural safeguards to accompany the Bell Companies' entry into the interLATA market for enhanced services. The time is ripe for the Commission to recognize -- as Congress has in every major piece of legislation that has been introduced in the last several years[8] -- that structural separation is the only effective means of preventing the Bell Companies from engaging in anticompetitive abuse in the enhanced services marketplace.

The time is also ripe for the Commission to recognize that the ideologically driven nonstructural safeguards of Computer III -- which were inadequate when first adopted[9] -- will not be up to the task of dealing with the Bell Companies' entry into the interLATA enhanced services marketplace.[10] ONA is a prime example.

8/ See, e.g., S.1086, 103d Cong. 1st Sess. § 11 (1993); S. 2112, 102d Cong. 1st Sess. § 201 (1991); H.R. 3515, 102d Cong. 1st Sess. § 201 (1991). Indeed, if the Commission were, on its own, to prescribe structural separation, it would reduce much of the urgency in Congress to legislate in this area.

9/ The Commission's initial decision in the Third Computer inquiry eliminating structural separation was found to be "arbitrary and capricious" by the Ninth Circuit. California v. FCC, 905 F.2d 1217, 1238 (9th Cir. 1990). The Commission's decisions on remand and in the ONA proceeding are once again before the Ninth Circuit. See California v. FCC, No. 92-70083 and consolidated cases (9th Cir. filed Feb. 14, 1992); California v. FCC, No. 90-70336 and consolidated cases (9th Cir. filed July 5, 1990).

10/ Indeed, these safeguards have not been up to the task of preventing anticompetitive abuse in today's regulatory environment. NYNEX's Material Enterprises Company scandal and BellSouth's MemoryCall problems are prime examples of such anticompetitive behavior. See Comments of MCI, CC Docket No. 90-623, at 45-66 (filed Mar. 8, 1991); Comments of American Newspaper Publishers Ass'n, CC Docket No. 90-623, at 26-36 (filed Mar. 8, 1991);
(Footnote 10 continued on next page.)

As the Commission itself has been forced to concede, ONA is far from the "self-enforcing" safeguard against anticompetitive discrimination which the Commission envisioned in Computer III.[11] Rather than representing a fundamental unbundling of the local exchange network, ONA has amounted to nothing more than a repackaging and relabelling of existing network services. Moreover, the Commission's ONA pricing rules have driven ONA beyond the economic reach of most non-BOC enhanced service providers.[12] Thus, as ITAA had feared and many had predicted, ONA has become a regulatory and marketplace irrelevancy.

The Commission's CPNI rules are similarly flawed. Rather than acting as a safeguard and creating a "level playing field," these rules affirmatively and unfairly discriminate against independent enhanced service providers. These rules provide the BOCs with unrestricted access to CPNI that is denied to competing enhanced service providers. As the Commission has acknowledged, this access to CPNI gives the BOCs a marketplace advantage over their competitors.[13] Plainly, such rules are no substitute for structural separation.

(Footnote 10 continued from previous page.)
Investigation into Southern Bell Tel. & Tel. Co.'s Provision of MemoryCall Serv., Docket No. 4000-U (Ga. PSC, June 4, 1991); see also Allnet v. Illinois Bell, 8 FCC Rcd 3030, 3041 (1993) (incomplete investigation of alleged BOC cross-subsidization).

11/ Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 F.C.C.2d 958, 1063-64 (1986) [hereinafter "Computer III"]; see Brief for Respondents at 65-66, California v. FCC, No. 90-70336 and consolidated cases (9th Cir. filed Apr. 17, 1992).

12/ See Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture and Rules Concerning Rates for Dominant Carriers, 6 FCC Rcd 4524 (1991); see also, e.g., Supplemental Comments of Ad Hoc Telecommunications Users Committee, CC Docket No. 89-79, at 6-7 (filed Sep. 30, 1992) (federally-tariffed ONA offerings would increase enhanced service provider costs between 100 and 400 percent); Comments of the Information Technology Association of America, CC Docket No. 89-79, at 13 (filed Sep. 30, 1992) (only cognizable demand for ONA services is attributable to interexchange carriers).

13/ See Computer III, 104 F.C.C.2d at 1090-91.

The same is true of the Commission's accounting rules. Prior to reversing course in Computer III, the Commission considered, and rejected, accounting separation as a viable means of protecting ratepayers and competitors from improper BOC cross-subsidization.[14] Just as it was obvious then, it is obvious now that the Commission lacks the resources to police cross-subsidies.[15] This was confirmed as recently as February of this year when the General Accounting Office once again concluded that "the number of FCC auditors remains inadequate to provide a positive assurance that rate payers are protected from cross-subsidization."[16] The BOCs' expanded entry into the enhanced services marketplace -- which interLATA relief would permit -- would exacerbate this problem, while at the same multiplying the opportunities for improper cost-shifting.

Structural separation, by contrast, is an effective and proven means of providing "protection for the regulated market ratepayers against costs transferred from the competitive market by the parent corporation, and protection for the general public against such anticompetitive activities as denial of access and predatory pricing."[17] Structural separation is effective because it minimizes the opportunities for abuse and, to the extent that such opportunities still exist, it makes them more visible. As the Commission has explained:

14/ BOC Separation Order, 95 F.C.C.2d at 1131.

15/ See GAO Report to the Chairman, Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, House of Representatives, Telephone Communications, Controlling Cross-Subsidy Between Regulated and Competitive Services, GAO/RCED-88-34, Oct. 1987, at 3.

16/ GAO Report to Congressional Requesters, FCC's Oversight Efforts to Control Cross-Subsidization, GAO/RCED-93-34 (Feb. 1993).

17/ Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 463 (1980); see also Computer III, 104 F.C.C. 2d at 977-78; BOC Separation Order, 95 F.C.C.2d at 1128-37, on reconsideration, FCC 84-252, at ¶ 15 (released June 1, 1984) [hereinafter "BOC Reconsideration Order"].

> [s]tructural separation reduces the common transactions between providers of basic services and affiliated providers of competitive offerings, and highlights transactions such as the flow of funds, transfers of information, and the procedures for accomplishing interconnection by affiliated vendors.[18]

Structural separation thus addresses the dual problems of cross-subsidization and discrimination. By separating a carrier's regulated and unregulated operations, structural separation eliminates most joint and common costs. As a consequence, it minimizes the need for difficult and, at times, arbitrary cost allocations and thus reduces the opportunity for improper cost-shifting. By requiring a separate affiliate to acquire transmission service on the same basis as competing enhanced service vendors, structural separation effectively deals with a carrier's ability to manipulate the availability, installation, maintenance, repair, and quality of basic transmission service. In doing so, structural separation not only ensures nondiscriminatory access to the carrier's basic network, but it also promotes cost-based pricing. By requiring separate marketing, structural separation also prevents the misuse of CPNI and the improper tying of basic and enhanced services. The requirement of a separate affiliate also provides greater certainty that network information will be disclosed in a timely and nondiscriminatory manner to all users.

Structural separation also addresses the human factor. Regardless of a BOC's corporate policy, people are people. Structural separation makes it easier for employees working on the regulated side of a carrier's business to deal with their co-workers on the unregulated side on an arm's-length basis, the same as they would with any other customer, by physically separating the carrier's regulated and unregulated operations. Indeed, structural separation ensures that a single employee does not have responsibility for a BOC's regulated and unregulated activities.

18/ BOC Reconsideration Order at ¶ 20.

Another major benefit of structural separation is that it successfully deals with all of the foregoing problems with a minimum of active Commission involvement.[19] After the Commission's initial review of a separate subsidiary's formation, the Commission need not actively monitor the business of, nor require reports from, a Bell Company's unregulated subsidiary. The Commission can limit its role to that of a "border guard" that reviews transactions between the regulated parent and unregulated subsidiary. Nonstructural safeguards, by contrast, require a high degree of Commission involvement and oversight. In order for nonstructural safeguards to be effective, the Commission must routinely and carefully review the numerous accounting and other reports that these safeguards entail. As noted above, the Commission lacks the resources to do so.

If the Commission is inclined to institute a rulemaking to address the issues raised by the BOCs, it should undertake a comprehensive review of the question of safeguards. Upon consideration of the relative merits of structural and nonstructural safeguards, the Commission should conclude that the public interest would best be served by a requirement that the BOCs provide interLATA enhanced services only through fully separate subsidiaries. Any notice of proposed rulemaking issued by the Commission should include such a finding. The Commission should also solicit comment on such other structural and nonstructural safeguards as may be necessary to promote the public interest and guard against anticompetitive abuse.[20]

19/ Notwithstanding their claims to the contrary, a separate subsidiary will not disadvantage the BOCs. The rest of the U.S. information services industry -- which is the world's acknowledged leader -- has achieved its preeminent position by dealing with the regulated network on a fully separate arm's-length basis. It is presumably in recognition of this fact that at least some BOC enhanced services are currently being offered through separate subsidiaries.

20/ The Commission, for example, should consider supplementing the separate subsidiary requirement with an obligation on the part of the BOCs to provide independent enhanced service providers with physical or virtual collocation.

III. CONCLUSION

For all the reasons set forth above, if the Commission decides to initiate the rulemaking proceeding requested by the BOCs, the Commission should propose -- and solicit comment on -- the requirement that the BOCs provide interLATA enhanced services only through fully separate subsidiaries of the kind prescribed by the Commission in the Second Computer Inquiry and subject to such other structural and nonstructural safeguards as the public interest may require.

Respectfully submitted,

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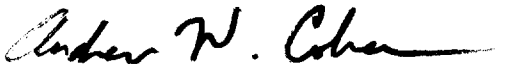

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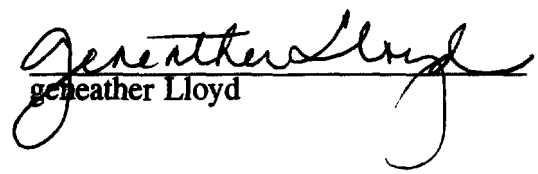
September 2, 1993

CERTIFICATE OF SERVICE

I, geneather Lloyd, hereby certify that copies of the foregoing Comments of The Information Technology Association of America, were served by hand or by first-class mail, postage prepaid, upon the parties appearing on the attached service list, this 2nd day of September, 1993.



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